In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1845

PAUL BROWN AND UNITED STATES TELEPHONE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners[1] contend that their convictions for entering goods into commerce by means of false statements, in violation of 18 U.S.C. 542, placed them twice in jeopardy because they were acquitted at a prior trial on a conspiracy charge concerning the same transactions.

On March 2, 1971, an indictment was returned in the United States District Court for the Sourthern District of New York charging petitioners[2] with one count of

[1]Petitioner United States Telephone Company was owned and operated by petitioner Paul Brown.

[2]The indictment named Nobi Kato, Frank Horiuchi, and Greenhill Kato and Company, Ltd., as co-conspirators, but not as defendants (Pet. App. C1).

conspiracy to defraud the United States by smuggling goods into the country (18 U.S.C. 545) and introducing goods into commerce in the United States by false statements (18 U.S.C. 542), in violation of 18 U.S.C. 371, with 36 substantive counts of entering goods by means of false statements, in violation of 18 U.S.C. 542 and 2, and with 36 substantive counts of smuggling in violation of 18 U.S.C. 545 and 2 (Pet. 3; Pet. App. A2, B1-B4, C1-C6). Following a jury trial, petitioners were acquitted on the conspiracy charge and the jury failed to reach a verdict on the 72 substantive counts. Pursuant to the government's motion, the court dismissed the 36 counts of smuggling, and petitioners were re-tried and convicted on the 36 counts of entering goods by means of false statements, in violation of 18 U.S.C. 542 (Pet. App. A2-A3). Petitioner Paul Brown was sentenced to a fine of $350 on each count, and consecutive sentences of two days' imprisonment on each count to be served on weekends, which were suspended. Petitioner United States Telephone Company received a fine of $100 on each count (Pet. App. A2). The court of appeals affirmed (456 F. 2d 293), and a petition for a writ of certiorari was denied. 407 U.S. 910.

On January 5, 1973, petitioners moved for a writ of error *coram nobis* setting aside the judgment of conviction and the sentences, and dismissing the indictment against them. The application was denied (Pet. App. A1-A3), and the court of appeals summarily affirmed on March 19, 1974 (Pet. App. A4). The petition for a writ of certiorari was filed on June 8, 1974, and is substantially out of time under Rule 22(2) of the Rules of this Court.[3] In any event, there is no occasion to grant the writ.

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[3]Since this Court's decision in *United States* v. *Morgan*, 346 U.S. 502, 505, n. 4, it has been settled that a motion in the nature of a writ of error *coram nobis* "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and

1. The evidence adduced at the second trial established that on 36 occasions petitioners used two sets of invoices for shipments of telephones imported into the United States. One set of invoices (which was never shown to United States Customs officials) showed the actual purchase price paid to the seller, and the other set, bearing a lower purchase price, was presented to Customs for use in determining the duties to be paid (Pet. App. A3). See also *United States* v. *Brown*, *supra*, 456 F. 2d at 295.

Petitioners argue that their second trial and subsequent conviction violated the doctrine of collateral estoppel and subjected them to double jeopardy, contending that proof of an agreement between two or more persons was a necessary element of the substantive offense for which they were convicted (18 U.S.C. 542), and that the jury verdict in the first trial necessarily adjudicated the non-existence of such an agreement.

2. The extraordinary remedy of *coram nobis* is available "only under circumstances compelling such action to achieve justice" (*United States* v. *Morgan*, 346 U.S. 502, 511), and only where there are "sound reasons existing for failure to seek appropriate earlier relief * * * ." *Id.* at 512. Here, however, petitioners have shown no reasons for their failure to raise the belated double jeopardy and collateral estoppel claims at an earlier time. The issues

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record, the beginning of a separate civil proceeding." While the Court added in *Morgan* that a *coram nobis* motion "is of the same general character as one under 28 U.S.C. §2255" (*id.* at 506, n. 4), it has since said that "a motion under §2255, like a petition for a writ of habeas corpus * * * , is not a proceeding in the original criminal prosecution but an independent civil suit." *Heflin* v. *United States*, 358 U.S. 415, 418, n. 7. Accordingly, the judgment of the court of appeals affirming the denial of the *coram nobis* motion was "the judgment of a court of appeals in a criminal case * * * ." Rule 22(2) of the Rules of this Court.

were not raised at all in the first trial, although petitioners' claim as to the identity of the conspiracy and substantive counts would seem to have been equally available then. Similarly, these issues were not raised at any time at the second trial, nor on appeal or in the petition for certiorari following affirmance of petitioners' conviction (in which proceedings petitioners were represented by their present counsel). Accordingly, the district court ought not to have entertained petitioners' motion for *coram nobis* relief.

3. Petitioners' double jeopardy and collateral estoppel arguments are, in any event, without merit. The statute that petitioners violated does not require an agreement between two or more parties for the commission of the offense (Pet. App. B2-B3), nor did the indictment allege such an agreement with respect to the counts under that statute (Pet. App. C5). Moreover, the actual submission of false invoices was not among the overt acts alleged in the conspiracy count (Pet. App. C3-C4). That the jury in the first trial may have found insufficient evidence of an agreement between petitioners and their alleged co-conspirators, and therefore returned a verdict of acquittal on the conspiracy charge, did not constitute a final adjudication as to petitioners that the underlying substantive offenses had not been committed. Cf. *United States* v. *Flowers*, 255 F. Supp. 485, 488-489 (E.D. N.C.).

At most, the acquittal established that petitioners and the Japanese suppliers named as co-conspirators did not agree to defraud the United States by entering imported merchandise by means of false invoices. That conclusion, however, is not inconsistent with the conclusion that petitioners actually submitted or caused to be submitted false invoices prepared by the suppliers. Proof that the suppliers had agreed to the submission of false invoices

in order to defraud the United States was an essential part of the conspiracy charge, but was not a necessary element of the substantive offenses, unlike the situation in *Sealfon* v. *United States*, 332 U.S. 575, on which petitioners rely.

Furthermore, where, as here, the commission of a substantive offense and a conspiracy to commit it are separable and distinct crimes, it is well settled that neither a conviction nor an acquittal on a conspiracy charge bars simultaneous or subsequent conviction on the substantive count, even as an aider and abetter. *Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640, 643-644.[4] The fact that some of the evidence to support the substantive convictions was also used in the earlier trial to support the conspiracy charge is immaterial. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *United States* v. *McGowan*, 423 F. 2d 413, 415-417 (C.A. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[4]Petitioners' situation is analytically no different than it would have been if the jury had convicted them on the substantive counts at the first trial while acquitting them on the conspiracy count. That a second trial occurred was not because they were charged anew following an acquittal, but simply because the jury at the first trial could not reach a verdict on the cuounts in question.

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